

August 21, 2007

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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**ORDER REVERSING ORAL RULING AT HEARING AND DISMISSING NOTICE AND
ORDER APPEAL AS UNTIMELY**

SUBJECT: Department of Development and Environmental Services File No. **E0501037**

JAMES R. RICHARDSON
Code Enforcement Appeal

Location: Parcel #062407-9019

Appellant: **James R. Richardson**
24243 Southeast 9th Street
Sammamish, Washington 98075

King County: Department of Development and Environmental Services (DDES)
represented by **Erroll Garnett**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
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A hearing was held by the Examiner on May 10, 2007, in regard to the above-referenced Notice and Order appeal. During the hearing, testimony was given that the notice of appeal was received on March 1, 2007, one day later than the February 28, 2007 deadline stated in the Notice and Order for receipt of such notice of appeal. Given the Appellant's seasonal residence out-of-state (to which the Notice and Order, sent certified mail, was forwarded) and resultant time lag in receiving mail, the Examiner ruled that the Examiner would consider the date of service to be the actual date the Appellant received the Notice and Order, which evidence shows was February 16, 2007. That would accordingly make the notice of appeal deadline March 2, 2007. In reviewing such ruling and the law which applies to filing timeliness, the Examiner makes the following Findings and Conclusions:

1. On February 9, 2007, DDES issued a Notice and Order citing James and Sandra Richardson and the subject property with a violation of County code by the operation of a landscape business on a Rural Area-10 (RA-10)-zoned parcel. The Notice and Order required that the property be brought into compliance by March 31, 2007 by cessation of the business and removal of business-related materials, or alternatively, by establishment of a primary nursery use which under the RA-10 zoning would permit the landscape business as an accessory use.

2. The Notice and Order on the second page in a section entitled “**Appeal (Including KCC Chapter 23.36):**” stated that the Notice and Order could be appealed, “provided the appeal is received in writing by DDES within Fourteen days **February 28, 2007** and a statement of appeal is received in writing by DDES within twenty-one days **March 7, 2007** of the date of service of the Notice and Order. The DATE OF SERVICE is three business days after the Notice and Order is mailed.” (Emphases in original)
3. As noted, the Notice and Order was issued February 9, 2007. There is some evidence in the record it was mailed that date, the Examiner takes official notice that it is the usual practice of DDES to mail the Notice and Order the same date of issuance, and without evidence to the contrary the Examiner finds that that occurred in this case.¹
4. The deadline date for filing the required Notice of Appeal was correctly stated in the Notice and Order as February 28, 2007. [KCC 23.02.080(A)(3)]
5. On March 1, 2007, DDES received a Notice and Statement of Appeal from Appellant James Richardson. There is no evidence that any Notice of Appeal was filed in this case prior to March 1, 2007.
6. The above-noted Notice and Statement of Appeal received by DDES March 1, 2007 constituted a “notice of appeal” as such term is used in the King County Code requirements for filing of administrative appeals to the Hearing Examiner and in the counterpart Hearing Examiner Rules of Procedure (ROP),² which use the identical term in their requirements for filing of appeals. [KCC 20.24.090 and ROP Part IV, p. 6]
7. At the May 10, 2007, hearing in this matter, the Examiner ruled orally that he would consider the date of service of the subject Notice and Order to be the date that the Appellant received it, February 16, 2007 rather than the code-prescribed date, since the Appellant seasonally resided out-of-state at the time with a resultant delay in forwarded mail delivery.
8. On review and further deliberation on the timeliness issue, the Examiner concludes that he does not have the legal authority to waive or relax the code-established presumed date of service, since it is established by ordinance duly enacted by the legislative body, the County Council.
 - A. Presumption of service by mail has been held valid by recent Washington case law. “Service by mail is complete as of three days after mailing....[The] argument that the presumption of completed service is rebutted if the mail takes longer than three days is unsupported by any authority.” [*Vanderpol v. Shotzko*, ____ Wn.App. ____ (2007) (Division I; cause no. 57616-0-1, filed January 2, 2007)] Citing the beneficial aim articulated by previous courts to “reduce congestion in the courts and delays in hearing civil cases” (citations omitted), the *Vanderpol* court held that “introducing the possibility of a challenge to service because of postal delay contravenes this purpose. It sets up collateral litigation, renders the rules themselves essentially useless, and penalizes the serving party for events beyond its control. The presumption that service is

¹ Neither Appellant Richardson nor any other person appearing has made any claim to the contrary.

² Which ROP are promulgated and issued under authority delegated by the County Council. [KCC 20.24.170(A)(1)]

deemed complete three days after mailing is intended to avoid exactly these kinds of disputes, and no court has held that if the Post Office takes four days instead of three, service is untimely.” It should also be noted that in this case, any “delay” in receiving the Notice and Order was due to the Appellant’s choice to have mail forwarded to a seasonal address.

- B. Appellate courts hold that filing deadlines established by law must be strictly observed. The Washington Supreme Court noted in *Conom v. Snohomish County*, 155 Wn.2d 154, 118 P.3d 344 (2005), that “we have repeatedly required parties to strictly adhere to the statutory procedures provided under [the Land Use Petition Act (LUPA)] for filing and serving a land use petition. In *Nykreim [Chelan County v. Nykreim]*, 146 Wn.2d 904, 53 P.3d 1 (2002)], for example, we held that the challenge to a boundary line adjustment was time-barred under LUPA because the petitioner failed to appeal the land use decision within 21 days. We found this strict adherence to statutory time limits consistent with the ‘strong public policy supporting administrative finality in land use decisions.’ *Nykreim*, [above] (quoting *Skamania County v. Columbia River Gorge Comm’n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001)).” Strict adherence to statutory filing requirements has also very recently been held as mandatory by the U. S. Supreme Court in the case of *Bowles v. Russell*, 551 U.S. ____ (2007). Under these case law holdings, the Examiner is compelled to conclude that code-established filing deadlines must be strictly observed, and the Examiner is without the discretion he applied at hearing in this matter. Accordingly, the Examiner’s oral ruling on the date of service must be reversed and the codified presumption of date of service respected strictly. Therefore the code-established date of service of February 14, 2007 must stand and be considered the date of commencement of the 14-day appeal period for filing the required Notice of Appeal and Statement of Appeal. The appeal period thus expired February 28, 2007.
9. Mr. Richardson’s Notice of Appeal was filed with DDES one day after the February 28, 2007 deadline, and as a result was not timely filed.
 10. Under the Hearing Examiner Rules of Procedure, timely filing of a notice of appeal is a jurisdictional requirement; in other words, if a notice of appeal is not timely filed, the Examiner does not have jurisdiction over the appeal.³
 11. Since the Examiner has no jurisdiction due to the untimeliness of the filing of the notice of appeal, the Examiner has no choice but to dismiss the appeal.
 12. “Enforcement of any notice and order of a director issued pursuant to [Title 23 KCC, the code enforcement title] shall be stayed as to the appealing party during the pendency of any administrative appeal under this title.” [KCC 23.36.020.B] Accordingly, since the appeal attempted by Mr. Richardson was pending from the time the notice of appeal was filed on March 1, 2007, until the date of this Order, the deadlines in the Notice and Order for compliance should accordingly be considered by DDES to be adjusted by the corresponding period of time, and penalty imposition also temporarily stayed on a similar basis.

³ “Timely filing of the notice of appeal...is a jurisdictional requirement; appeals which do not meet the filing requirements cannot be considered by the Examiner.” [ROP IV.A]

ORDER:

The appeal by James Richardson of the Notice and Order issued in this case by the Department of Development and Environmental Services on February 9, 2007 is **DISMISSED** as untimely and therefore not within the jurisdiction of the Examiner to hear.

ORDERED August 21, 2007.

Peter T. Donahue
King County Hearing Examiner

TRANSMITTED August 21, 2007 via certified mail to the following:

James Richardson
24243 SE 9th St.
Sammamish, WA 98075

TRANSMITTED August 21, 2007, to the following parties and interested persons of record:

James Richardson
24243 SE 9th St.
Sammamish WA 98075

Deidre Andrus
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MS OAK-DE-0100

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NOTICE OF RIGHT TO APPEAL

The Examiner's Summary Order shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's Order. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

PTD:ms
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